



## Treasury's issues paper on non-competes and other restraints Response from Herbert Smith Freehills

### 1 Introduction

- 1.1 The Employment, Industrial Relations, and Safety Team at Herbert Smith Freehills (**HSF**) welcomes the opportunity to provide submissions in response to the Treasury's issues paper entitled 'Non-competes and other restraints: understanding the impacts on jobs, business and productivity', dated April 2024 (**Issues Paper**).
- 1.2 HSF is one of the world's leading commercial law firms, bringing the best people together across our 26 offices globally. We have a number of specialist practice areas, including market-leading experts in employment and competition, which are active in advising clients on the legal issues arising in connection with restraints of trade. These experiences mean that we have a significant perspective on the issues raised by the Issues Paper and their impact on businesses, employees, and the wider community.
- 1.3 Drawing on our extensive experience in restraints of trade and in advising a range of clients in relation to this area in Australia and abroad, we make the following submission.
- 1.4 HSF has actively consulted with our Australian clients, taking into account their perspectives in this submission. The views expressed in this submission reflect those discussions and have been incorporated on an anonymised basis.
- 1.5 In preparing our submission, we have undertaken a comprehensive examination of various forms of restraints of trade. This includes non-compete clauses, non-solicitation clauses regarding co-workers and clients, no-poach agreements, non-disclosure clauses, wage-fixing, and other restraints. Our analysis of these various restraints has informed our recommendations and underpins our responses to the issues raised in Issues Paper.

### 2 Executive Summary

- 2.1 This submission includes general comments on the reform process, and more specific responses in respect of questions 1 to 16 of the Issues Paper.
- 2.2 Our submission is grounded in the belief that the common law position, which has evolved over time, aptly addresses the complexities around non-compete clauses and other restraint of trade provisions. Courts have consistently upheld that the most effective way to mitigate against the risk of a former employee improperly using confidential information and to protect goodwill is through contractual post-employment restrictions, such as non-compete clauses.
- 2.3 We acknowledge the potential for legislative change in this area. However, we caution that there is no simple solution to this complex issue. Any proposed legislative reform has the potential to introduce greater uncertainty and could lead to inadvertent consequences. We therefore urge the government to exercise caution before undertaking legislative reform in this area. Should the government be inclined to legislate in this area, our submission outlines a proposed mechanism for legislative change. Potential reforms could include an income threshold requirement, a compensation requirement, limitations on duration, and a potential requirement for employees to receive independent legal



- 3 Does the common law restraint of trade doctrine strike an appropriate balance between the interests of businesses, workers and the wider community? If no, what alternative options are there?

advice before a restraint clause can be validly included in an employment agreement. However, we reiterate that the current common law doctrine, which has been refined over time by the Courts, in our view, already provides a robust framework that adequately protects the interests of businesses, workers, and the wider community.

### **3 Does the common law restraint of trade doctrine strike an appropriate balance between the interests of businesses, workers and the wider community? If no, what alternative options are there?**

- 3.1 The consensus view across the majority of our clients is that the common law restraint of trade doctrine serves as a valuable instrument, effectively safeguarding the business interests of employers, without unjustly impeding worker mobility and the wider community.
- 3.2 Firstly, it is worth restating that clauses designed to restrict an employee's post-employment activities are limited by the nature of the restraint activity,<sup>1</sup> the duration of the restriction and the geographical scope. In addition, the starting point in most jurisdictions in Australia is that a Court will presume a non-compete or other restraint clause is unenforceable for public policy reasons. A Court will only enforce such a restraint to the extent they are reasonably necessary to protect the employer's 'legitimate business interests'.<sup>2</sup> It is the employer who seeks to benefit from the non-compete who has the burden of rebutting the presumption.
- 3.3 The case law has shown that restraints are notoriously difficult to enforce,<sup>3</sup> given the relatively high bar for demonstrating 'legitimate business interests'. As such, these restraints are typically only found and enforced in employment contracts of highly paid and senior employees (in our experience, many restraint clauses found in employment contracts of low-wage or junior employees have been included without a clear justification for their inclusion). The combination of the preceding restrictions, refined over time through the Court system, results in a robust framework that protects the interests of businesses, workers and the wider community (**Stakeholders**).
- 3.4 Secondly, the common law restraint of trade doctrine has been meticulously shaped by the Courts on a case-by-case basis. This approach, while firmly rooted in legal principle, also demonstrates the flexibility necessary to strike a balance between Stakeholders, ensuring it aligns with the public interest.
- 3.5 Thirdly, protecting confidential and proprietary information is a priority for most businesses and forms an essential part of employment arrangements. Non-compete clauses, along with other post-employment restraints of trade, serve a crucial function to safeguard this information from misuse or unfair competition, especially when other protective measures fall short. This becomes particularly important where an employee shows an intention to use confidential and proprietary information for personal gain or for the benefit of a third party, such as a new employer. A prevalent concern among many employers, echoed by our clients, is the scarcity of alternative mechanisms for employers to safeguard their commercially sensitive information in the absence of restraint clauses.
- 3.6 Fourthly, a non-compete clause defines the parameters between an employee's skills and knowledge and an employer's trade secrets – a distinction that can often be difficult to enforce due to ownership ambiguities. This clarity is beneficial not only for employers and employees, but also for investors. It allows investors to accurately assess potential risks to their investment, as the non-compete clause serves to protect an employer's

<sup>1</sup> *Commsupport Pty Ltd v Mirow* [2018] QDC 134.

<sup>2</sup> *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688.

<sup>3</sup> See Figure 1.



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assets.<sup>4</sup> In addition, employers are more motivated to invest in their employees if their interests can be protected in part by non-compete or other restraint clauses.

- 3.7 Fifthly, the data available does not conclusively suggest that restraints restrict job mobility or negatively impact the Australian economy. Further, there is limited evidence to suggest that employees prefer to prioritise job mobility over the potential benefits of enforceability of restraint clauses (such as greater investment in training or remuneration).<sup>5</sup> The studies and data cited by the Issues Paper largely draw from international examples, such as the United States, which operates in a vastly different economic context. The gaps in research and data makes it difficult to draw conclusions and assess the potential effects of legislative reform on different industries, as well as its impacts on Stakeholders.

### Avenues for reform

- 3.8 Whilst this submission posits that restraints of trade serve as a valuable and necessary instrument, and that the existing common law restraint of trade doctrine already strikes an appropriate balance between the interests of Stakeholders, should the government be inclined to increase the difficulty of enforcing such restraints, then we suggest exploring specific areas for reform as an alternative to a blanket ban on non-competes. A nuanced approach is required; however, it is not straightforward to regulate restraints of trade due to their complex nature and the varying circumstances in which they are applied.
- 3.9 We propose an approach that includes potential reforms such as implementing threshold remuneration requirements before a non-compete or other restraint clause can be included in an employment contract; requiring compensation for some restrained employees; setting limited duration requirements; and a requirement for an employee to receive independent legal advice before a restraint clause can be validly included in an employment agreement. We will address each of these potential reforms in turn.

#### *Requirement 1 – Income threshold*

- 3.10 We submit that implementing an income threshold before restraints can be enforced, would be a suitable regulatory response to protect Stakeholders, aligning with the approach taken by Austria and Luxembourg.
- 3.11 It is accepted that many non-competes apply to low-wage or junior employees who generally hold limited bargaining power and do not have access to the employer's commercially sensitive information and business relationships that restraints are seeking to protect.<sup>6</sup> Implementing a threshold requirement would address and ameliorate some of the concerns expressed in the Issues Paper in relation to the unreasonable application of restraints to low-wage employees.
- 3.12 Whilst the 'high income threshold' concept used in the *Fair Work Act 2009* (Cth) may seem like a compelling enforcement threshold, it is imperative to note that, in the Australian context, there are employees earning below this threshold who have access to and possess confidential and commercially sensitive information. This argument is given further weight when considering the Australian Bureau of Statistics reported that the

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<sup>4</sup> Employment Lawyers Association, 'ELA L&P Committee: Measures to Reform Post-Termination Non-Compete Clauses in Contracts of Employment: BEIS Consultation – Response from the Employment Lawyers Association' (26 February 2021), 5.7 (ELA Response).

<sup>5</sup> Evan Starr, 'Consider This: Training, Wages, and the Enforceability of Covenants Not to Compete' (24 May 2018) Forthcoming at Industrial and Labor Relations Review, Available at SSRN: <https://ssrn.com/abstract=2556669>; ELA Response (n 4) 8.4.2.

<sup>6</sup> Dr Iain Ross, 'Non-compete clauses in employment contracts: The case for regulatory response', TTPI Working Paper 4/2024 (March 2024), Available at: [https://taxpolicy.crawford.anu.edu.au/sites/default/files/publication/taxstudies\\_crawford\\_anu\\_edu\\_au/2024-03/complete\\_wp\\_i\\_ross\\_mar\\_2024.pdf](https://taxpolicy.crawford.anu.edu.au/sites/default/files/publication/taxstudies_crawford_anu_edu_au/2024-03/complete_wp_i_ross_mar_2024.pdf), 26.



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median personal income was \$54,890 during the most recent reporting period in 2020-2021.<sup>7</sup> Therefore, we suggest the following income-based threshold:

- For employees receiving a total remuneration less than \$100,000 per annum, there will be a rebuttable presumption that post-employment restraints are void and unenforceable if greater than 3 months duration and Requirements 2, 3 and 4 below are not met.
- For employees receiving a total remuneration between \$100,000 and \$150,000 per annum, restraints are valid if Requirements 2 and 3 below are met.
- For employees receiving a total remuneration above \$150,000 per annum, the traditional common law position applies.

#### *Requirement 2 – Compensation*

3.13 Jurisdictions such as Finland, Germany, the Netherlands and Spain have proposed post-employment mandatory compensation for the period in which employees are subjected to restraint clauses. These approaches hold merit, particularly when an employee faces prolonged unemployment due to a non-compete or other restraint.

3.14 In this context, we submit that it would be appropriate to implement a requirement for the previous employer to compensate an employee, where the employer seeks to enforce a post-termination restriction such as a non-compete clause. For example, if an employee receiving a total remuneration totalling \$125,000 per year is barred from commencing work with their new employer for 6 months, the previous employer would be obligated to compensate them for a percentage of their base salary that they would have earned during that period. This compensation would not include bonuses or other additional remuneration. In general, compensation could remove financial barriers that might prevent a departing employee from starting their own business, and it could encourage employers to enforce restrictions for a shorter duration.

3.15 The difficulty with such an approach lies in quantifying the amount of compensation and whether compensation is payable for all restraints or non-competes only, which could potentially be a complex task leading to further uncertainty. We propose that any compensation requirement only extend to the enforcement of non-competes rather than other forms of post-employment restrictions such as non-disclosure and non-solicit clauses. The interplay between the compensation paid during the restraint period, and any payments made in lieu of notice of termination or any 'gardening leave' arrangements, should also be taken into account.<sup>8</sup>

#### *Requirement 3 – Restrictions on duration*

3.16 As demonstrated by Table 1 of the Issues Paper, all examined jurisdictions have implemented a limited duration requirement extending from 3 months to 24 months. While we believe that the current law regarding restraints is adequate, should the government be inclined to reform this area, we submit the following is a suitable approach:

- For employees receiving a total remuneration between \$100,000 and \$150,000 per annum, restraints of not more than 6 months with compensation (see Requirement 2) is valid and enforceable.
- For employees receiving a total remuneration above \$150,000 per annum, the traditional common law position applies.

3.17 In practice, non-compete provisions seldom extend beyond 12 months, as demonstrated by Figure 1. Of the restraints held to be enforceable, approximately a quarter were found to be enforceable for a period of 12 months or more. Figure 1 further demonstrates that

<sup>7</sup> <https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/personal-income-australia/2020-21-financial-year>.

<sup>8</sup> Ibid 29.



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just under half of all litigated non-compete and non-solicit restraints have been ruled as either unenforceable or void for public policy reasons.

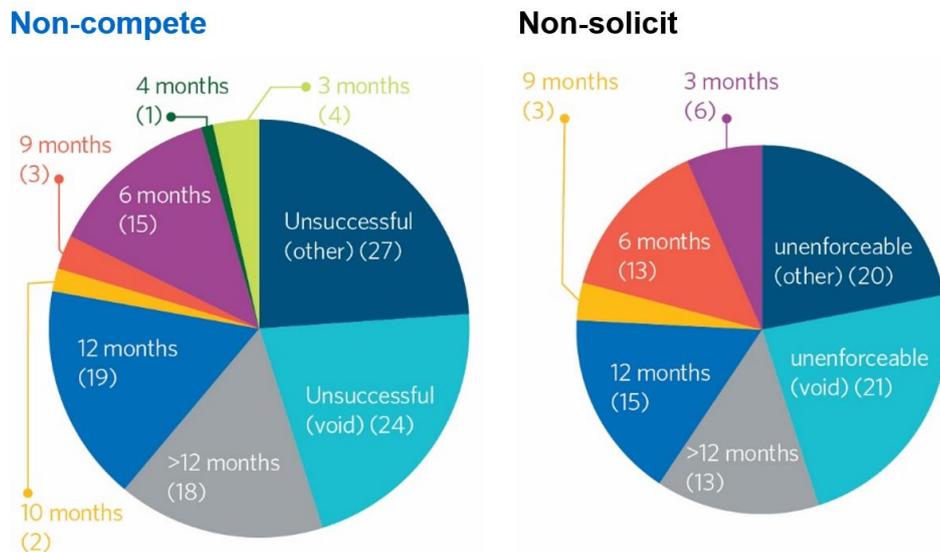


Figure 1 Reported decisions in the period January 2010 to December 2023 where non-compete and non-solicit restraints have been held to be enforceable (including the applicable period of such restraints) or otherwise unenforceable by Australian Courts.

Requirement 4 – Independent legal advice requirement for restraint clauses

- 3.18 We propose the implementation of a requirement for employees to receive independent legal advice before a restraint can be validly included in an employment contract for an employee whose remuneration is less than \$100,000 per annum. This may mean that employers may be required to pay a nominal sum to their employees for the purposes of assisting the employee in obtaining legal advice regarding the implications of the restraint clause.
- 3.19 This requirement would enable employees to fully comprehend the proposed restraint (as there may currently be a tendency for employees to sign an offer of employment without fully understanding the implications of a restraint clause) and provide them with greater bargaining power to negotiate their employment contracts. If the employee does not receive independent legal advice, then the restraint will be invalid and unenforceable.
- 3.20 Further, requiring employers to pay a specified amount, such as \$500, would discourage employers from indiscriminately inserting restraints in all employment contracts without first considering their broader implications. Instead, restraint clauses would likely be included in contracts where the restraint is reasonable and necessary to protect the employer’s legitimate business interests.
- 3.21 A similar practice exists in the United Kingdom for employees who are negotiating and executing a settlement agreement. As a matter of UK law, it is necessary for an employee to receive independent legal advice on the terms of a settlement agreement in order for the agreement to be valid. As a result, most employers offer employees a nominal contribution (typically around £500) for the purposes of obtaining independent legal advice.
- 3.22 The proof of receipt of the independent legal advice could be in the form of a solicitors certificate that is a prescribed form under the relevant regulations.



**4 Do you think the Restraints of Trade Act 1976 (NSW) strikes the right balance between the interest of businesses, workers and the wider community? Please provide reasons. If not, what alternative options are there?**

- 4.1 In New South Wales, the *Restraints of Trade Act 1976* (NSW) (**Restraints of Trade Act**) enables the restraint clauses in contracts governed by New South Wales law to be read down by the New South Wales Supreme Court, so as to be valid to the extent such clauses are not against public policy.
- 4.2 This means that if a restraint clause goes beyond what is reasonably necessary to protect the employer's legitimate business interests, it could be read down to be valid to the extent necessary to capture the conduct of the offending party, if a restraint to that extent would have been valid.
- 4.3 As a result, the attention is focused on the actual or apprehended breach, rather than on imaginary or potential breaches. This has the effect that restraint clauses in states other than New South Wales are relatively harder to enforce.
- 4.4 In fact, given the difficulty in enforcing restraints in jurisdictions other than New South Wales, many employers have resorted to cascading or 'ladder' clauses to reduce the likelihood of a restraint clause being struck out. The main criticism of the use of cascading clauses is the difficulty they pose for employees in understanding whether the restraint is enforceable. In light of this, the Restraints of Trade Act provides a more practical approach and reduces the need for cascading clauses.
- 4.5 In a similar nature, if changes to the Restraints of Trade Act were to occur, we expect employers may need to consider the use of alternative 'restraint'-type mechanisms, such as extending notice periods or utilising 'gardening leave' provisions on a more regular basis. The increased use of these approaches brings additional considerations for employers and employees alike and may not be as clearly principled and transparent as the common law restraint of trade doctrine and the Restraints of Trade Act.

**5 Are current approaches suitable for all workers, or only certain types of workers? For example, senior management, low-income workers, or care workers etc?**

- 5.1 We submit that the suitability of restraints of trade should be evaluated on a case-by-case basis, in line with the common law restraint of trade doctrine. This approach allows Courts to consider factors such as the nature of the work, the worker's role and responsibilities, and the worker's access to commercially sensitive business information.
- 5.2 We acknowledge that certain employees, particularly low-income workers who typically do not have access to commercially sensitive information, may be unduly restricted by non-compete and non-solicit provisions. However, restrictions are not commonly imposed on such workers, and even when they are, they are unlikely to be enforceable against them. The introduction of Requirement 4 above, which requires an employee to receive independent legal advice before a restraint can be validly included in an employment agreement, can serve as a deterrent to imposing unnecessary restraints on such employees. It would ensure that when restraints are included in employment contracts, employees are better informed about the implications of the restraint and enhance their ability to negotiate the terms of their employment contracts.
- 5.3 Similarly, enforcement of restraints of trade is more likely in industries where competition is rife and confidential information about clients, customers and suppliers is vital. Such



industries include the financial and consulting sectors, but less in industries such as the manufacturing sector.<sup>9</sup>

- 5.4 As discussed in 3.10 to 3.12, implementing an income threshold could be an appropriate measure to mitigate the concerns raised in the Issues Paper in relation to low-income workers. A threshold requirement can ensure that businesses can continue to invest in the development of its workforce and protect their legitimate business interests.

## **6 Would the policy approaches of other countries be suitable in the Australian context? Please provide reasons.**

- 6.1 We acknowledge that the regulation of non-competes and other restraints has recently been a subject of significant discussion globally. However, there is no uniform approach in international jurisdictions, demonstrating the difficulty in conducting legislative reform.

- 6.2 We do not support a widespread ban on non-compete clauses or other restraints, as has recently been adopted by the United States Federal Trade Commission<sup>10</sup> (although subject to possibly being overturned). Importantly, significant data gathering, consultation and scrutiny was conducted in the United States prior to embarking on the path towards prohibition of non-competes. We, therefore, submit that a similar level of research and data gathering is necessary prior to any legislative reform in Australia.

- 6.3 The approaches in other jurisdictions including the United Kingdom, Austria, Finland, Germany, Netherlands, and Spain also do not propose a total ban on the use of non-competes. Such jurisdictions have instead adopted or proposed some restrictions on non-competes, such as duration limitations and income threshold requirements. These jurisdictions have acknowledged the benefits of restraints of trade and the value that they provide for Stakeholders.

- 6.4 In our view, the Australian context could benefit from the approach taken by Austria, which provides the most balanced approach with a minimum income threshold to protect low-wage employees whilst enabling businesses to safeguard their legitimate interests.

## **7 Are there other experiences or relevant policy options (legislative or non-legislative) that the Competition Review should be aware of?**

- 7.1 See 3.8 to 3.20 above.

- 7.2 In addition, it is imperative to note that a ban on non-competes or other restraints could lead to increased employee monitoring by businesses. Without the security that restraint of trade clauses provide, businesses are likely to seek other avenues to secure their investments and information. Increased monitoring to track the dissemination of confidential information is one such example.

- 7.3 Restraints of trade are not the only mechanisms that employers can use to protect their business interests. If such protections are removed, we anticipate that there could be unintended consequences, such as an increase in litigation through other avenues, including breaches of intellectual property laws or under the *Corporations Act 2001* (Cth). In such circumstances, there may be increased uncertainty for employees and employers alike, as restraint provisions currently provide certainty for employees about what they can and cannot do post-employment.

- 7.4 Whilst it is beneficial to consider the regulatory reforms proposed by overseas jurisdictions, there is a risk associated with simply adopting an approach without considering the overall legal landscape, including other regulatory regimes that may operate, such as unfair dismissal laws in Australia (versus the approach taken in the

<sup>9</sup> Christopher Arup, Chris Dent and John Howe, 'Restraints of Trade: The Legal Practice' (2013) University of New South Wales Law Journal 36(1), Available at: <https://classic.austlii.edu.au/au/journals/UNSWLawJl/2013/1.html#fn31>.

<sup>10</sup> Federal Trade Commission, 'FTC Announces Rule Banning Noncompetes' (23 April 2024), Available at: <https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes>.



United Kingdom), and employment-at-will practices in the United States. Additionally, factors unique to Australia, such as the relatively smaller market, fewer competitors and differing economic circumstances, should be taken into account when considering regulatory reforms and comparing approaches taken by other jurisdictions.

**8 What considerations lead businesses to include client non-solicitation in employment contracts? Are there alternative protections available?**

8.1 Non-solicitation of client clauses are crucial in protecting against disruptions to business operations and potential negative impacts on the financial stability of a business. Businesses invest a significant amount of time and resources in developing customer relationships. This investment is futile where clients are solicited to other enterprises. Further, client non-solicitation clauses are required to prevent confidential information from being exploited or used to gain an unfair advantage. Uses of this nature have an outsized impact on many business functions and can result in negative customer experiences.

8.2 Employers have limited means available to protect themselves where client non-solicitation is impermissible. Client non-solicitation clauses promote fair competition between businesses by preventing a new employer from immediately benefiting from the investment that the previous employer made in fostering the client and employee relationships. Removing this protection may make businesses more hesitant to invest in their staff.

8.3 Further, there is a broader public policy rationale for enforcing non-solicitation clauses, as employees possess a unique, potentially unfair advantage in knowing the names and pay of their colleagues, and the details of clients, making solicitation easier.

**9 Is the impact on clients appropriately considered? Is this more acute in certain sectors, for example the care sector? Please provide reasons.**

9.1 A client may experience a disruption in service if an employee, with whom they have a close working relationship, transitions to a new company, and is prevented from continuing to work with the client due to a no-poach clause. However, this potential disruption must be appropriately balanced against an employer's need to protect their legitimate business interests.

9.2 No-poach and other restraints are necessary to prevent unfair competition, such as an employee taking clients with them to form a new business or to benefit a third-party competitor.

9.3 Non-solicitation obligations in a former employee's contract of employment do not necessarily prohibit the client from leaving a business at their own initiative, provided the employee has done nothing to solicit them.

9.4 Similarly, the former employer should have the opportunity to try and retain the client. The employer, who may be taken by surprise by the employee's decision to leave, must have the opportunity to transfer these relationships and protect its business by introducing new employees to those clients to win them over.

**10 What considerations lead businesses to include co-worker non-solicitation in employment contracts? Are there alternative protections available?**

10.1 Businesses include co-worker non-solicitation clauses in employment contracts for various reasons. These include preventing disruption and associated costs of employee



turnover, protecting morale and culture, which could be compromised by a mass departure of employees, and providing certainty for strategic planning.

- 10.2 Businesses invest significantly in recruiting, training and developing their employees. Non-solicitation clauses protect this investment and the impact that multiple departures from the same team, at the same time, can have on organisations.
- 10.3 Non-competes, while broader than non-solicitation clauses, can also prevent former employees from poaching employees or starting a competing business.
- 10.4 We note the concerns raised in the Issues Paper that co-worker non-solicitation may impede a worker's ability to benefit from networks made, and result in reduced business dynamism and competition in the economy. However, it is the view of our clients that employers have limited means available to protect against this instability where co-worker non-solicitation is impermissible.

## **11 Is the impact of co-worker non-solicitation clauses more acute for start-ups/new firm creation or in areas with skills shortages in Australia?**

- 11.1 Non-solicitation clauses provide employers with the necessary assurance to protect their workforce and invest in their employees' skills and development. For start-ups and new firms, this enables innovation to thrive, as these businesses are given peace of mind that their employees will not abruptly leave. Similarly, in the event that non-competes are banned, start-ups could suffer a disadvantage where more established organisations have the means to poach their talented staff.
- 11.2 If co-worker solicitation is permitted at any stage, employers of all types might be deterred from investing in their workforce. This could also disadvantage employees who may not be able to fully capitalise on investment from their employers into their training.
- 11.3 There is certainly no issue with general advertising and recruiting practices. The primary concern lies in preventing solicitation and the exploitation of unfair advantages. The recruiting industry is specifically designed to acquire staff, and it is crucial to ensure that individuals do not unfairly solicit co-workers. Similarly, employees should not be permitted to leverage knowledge or information that is not otherwise in the public domain.
- 11.4 Further, as acknowledged by the Issues Paper,<sup>11</sup> there is insufficient data to suggest that the impact of co-worker non-solicitation clauses is more acute for start-ups or in areas with skills shortages. We recommend conducting further research in this area before implementing any legislative reform.

## **12 What considerations drive businesses to include non-disclosure clauses in employment contracts? Are there alternative protections, such as s 183 of Corporations Act 2001 available?**

- 12.1 Businesses include non-disclosure clauses in employment contracts for a variety of reasons, including the protection of commercially sensitive business information such as trade secrets, business strategies, technology and customer lists. These clauses further enable businesses to remain competitive by preventing employees from sharing confidential information with competitors.
- 12.2 Many of our clients operate service businesses that are based on significant intellectual property investments. Given the detrimental impact that loss or inappropriate employee acquisition of these investments may have, it is imperative for businesses that there are

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<sup>11</sup> Issues Paper, 27.



appropriate avenues to protect their investments. One of the best ways to do so is through clearly drafted express non-disclosure terms in a worker's employment contract.

12.3 Confidential information may also be protected through the common law, equitable duties or statute.

12.4 The primary distinction between non-disclosure clauses and section 183 of the *Corporations Act 2001* (Cth) (**Corporations Act**) lies in their level of specificity. Non-disclosure clauses tend to be more detailed and tailored to specific circumstances, while s 183 operates at a more general, overarching level. Including a non-disclosure clause in the contract provides greater certainty for the employee, rather than merely relying on the Corporations Act. Employees may not be aware of their obligations under the Corporations Act. Further, without a specific non-disclosure clause, employees might face uncertainty about what constitutes 'confidential information' if the employee is solely relying on legislation to protect their interests.

12.5 The equitable duty of confidence may also protect confidential information in circumstances where there is no formal contract provided the following factors are satisfied:

- the information is specifically identifiable;
- the information has the necessary quality of confidence;
- the information has been imparted to the employee in circumstances implying an obligation of confidence; and
- there is a threatened or actual unauthorised misuse or disclosure of the information by the employee or former employee.

### **13 How do non-disclosure agreements impact worker mobility?**

13.1 As noted by the Issues Paper, job mobility plays an important function in a dynamic and competitive economy.<sup>12</sup> However, there is no real evidence to suggest that non-disclosures have a negative impact on worker mobility. It is challenging to assess the extent to which restraints of trade might impact worker mobility, as such provisions do not prevent employees from switching roles but only limit how employees perform their new job.

13.2 In the case of non-disclosure agreements, employees are not barred from moving to a new employer but merely are restricted from disclosing the information gained in their previous role. In such cases, banning or limiting non-disclosure agreements or other restraints does not seem to address the central concern regarding worker mobility and wage growth.

### **14 How do non-disclosure agreements impact the creation of new businesses?**

14.1 As identified by the Issues Paper, there is little research on the impacts of non-disclosure agreements on workers and businesses.<sup>13</sup> However, from the perspective of employers and investors, non-disclosure agreements provide a necessary safeguard against

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<sup>12</sup> Issues Paper, 4.

<sup>13</sup> Issues Paper, 29.



confidential business information being exploited for the purposes of fuelling the creation of a competing business.

- 14.2 Indeed, this view is held by a number of our clients who posit that non-disclosure agreements prevent the establishment of new businesses that profit from the use of confidential or commercially sensitive information not available in the public domain.

## **15 When is it appropriate for workers to be restrained during employment?**

- 15.1 Restraints placed on workers during their employment are generally justified to uphold the worker's duty of fidelity, to maintain a worker's loyalty to the company and to establish trust and confidence. As identified in the Issues Paper, workers have a common law duty to serve their employer faithfully. In return for workers receiving pay and benefits, it is reasonable that workers dedicate working hours to benefit their employer and the employer's enterprise. In such circumstances, it is also reasonable to prevent workers from engaging in work that may be in direct conflict with the interests of their employer.
- 15.2 This view is held by several of our clients who express concerns regarding employees working on other business endeavours during business hours, which are in direct competition with their interests. Any such conduct is inappropriate and should be restrained.
- 15.3 Further, it can be discouraging for employers who invest in their businesses to see benefits are being diverted elsewhere. An employee, privileged with access to and knowledge of an employer's information, without bearing any personal risk, should not be allowed to operate without restraint during their employment. Such a view is not justified on any economic analysis.

## **16 Is it appropriate for part-time, casual and gig workers to be bound by a restraint of trade clause?**

- 16.1 Whether it is appropriate for a part-time, casual or gig worker to be bound by a restraint of trade clause depends on a variety of factors, including the nature of the work and whether the employee has access to commercially sensitive information.
- 16.2 Generally, the remuneration received by casual and gig workers is typically adjusted to take into account that these types of employees are hired with the understanding that they can depart the business at any time. As such, the nature of the work performed by casual and gig workers implies that they are less likely to have access to commercially sensitive information. In such circumstances, it is less appropriate for a restraint of trade clause to apply to these workers.
- 16.3 On the other hand, part-time employees could be working as much as four days a week and hold senior positions with access to commercially sensitive information. In such cases, imposing a restraint on a part-time worker during employment may be deemed reasonably necessary to safeguard an employer's legitimate business interest.
- 16.4 The above considerations demonstrate the need for a case-by-case analysis in relation to the applicability and reasonableness of restraint clauses.

Yours sincerely

**Herbert Smith Freehills**

31 May 2024